

IN THE SUPREME COURT OF MISSOURI

SC92208

**ARNAZ CRAWFORD
APPELLANT**

VS.

**DIVISION OF EMPLOYMENT SECURITY
RESPONDENT**

Appeal from the Decisions of
The Labor and Industrial Relations Commission
Division of Employment Security Nos. 10-1496-G-A, et.al.
Appeal No. ED96130

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. The Division's argument that the redetermination was valid fails because Mr. Crawford did not waive the issue, and because the redetermination was triggered only by the decision by the Social Security Administration, and not by any new evidence.

The Division, in its attempt to argue that Mr. Crawford has waived his right to contest the redetermination process, fails to discuss the recent case from the Court of Appeals of *Adams v. Division of Employment Security*, 353 S.W.3d 668 (Mo. App. E.D. 2011). Mr. Crawford has thoroughly discussed this case in his initial substitute brief, and asks this Court to apply the principles of that decision to determine there was no waiver of the issue of good cause to redetermine the issues here.

On the merits of the redetermination issue, the Division acknowledges that Mr. Crawford notified the Division he had applied for Social Security benefits. Div. Substitute Brief, p. 8. The Division also concedes that Mr. Crawford notified the Division immediately when he had been found eligible to receive Social Security benefits. Div. Substitute Brief, p. 11. There is also no dispute that the Social Security Administration originally had denied his claim for disability benefits, Div. Substitute Brief, p. 8, so during the time he received unemployment

compensation benefits, he was proceeding under the understanding he could not currently get Social Security benefits, which was correct at that time.

Regarding the redetermination, the triggering event which led to the Division's redetermination of benefits, resulting in the alleged overpayment, was the decision by Social Security to reverse its initial decision and to find that Mr. Crawford did qualify for Social Security benefits. Nothing else had changed in the months Mr. Crawford was receiving unemployment compensation benefits.

The Division here claims it "reconsidered its prior determinations because the Division learned new material facts which were unknown to it when it made its prior determinations." Div. Substitute Brief, p. 29. The only "new fact" the Division references is a vague statement by Mr. Crawford about his ability to work. The Division seems to rest its case on a small portion of the Division's summary of a statement Mr. Crawford made to a deputy: "I haven't been able to work for a long time." Div. Substitute Brief, p. 12. This one remark, which was a clause from a longer sentence, has been taken out of context. It is clear from the entire message summary that Mr. Crawford was informing the Division of the Decision of the Social Security ALJ that he was now entitled to Social Security payment because the SSA had changed its initial ruling and found he had not been able to work under its regulations. TR1, 126.

Social Security's retroactive decision to find him eligible for benefits should not be the cause of an overpayment in unemployment benefits here when Mr. Crawford followed all proper procedures and the Division had no new evidence before it.

The Division concedes that Section 288.040.4(3) provides that "the Division cannot reduce a claimant's unemployment compensation by the amount of Social Security benefits that the claimant receives." Div. Substitute Brief, p. 32. The Division then flatly states: "This statute was not violated here." Id. While it is true that Mr. Crawford's unemployment benefits were not reduced during the period his Social Security case was being considered, the Division's later actions, which had retroactive effect, resulted in the unemployment benefits being reduced precisely because he received Social Security payments.

The Division initially determined that Mr. Crawford was eligible for unemployment benefits on the basis of the same facts Social Security later used to determine Mr. Crawford was disabled. Therefore, when the Division retroactively used the same facts to determine Mr. Crawford was not eligible for unemployment benefits, the Division effectively did reduce his benefits in violation of Section 288.040.4(3).

If the Division admits unemployment benefits can't be reduced because a person also receives Social Security, then it is improper to collect an overpayment.

II. The Division incorrectly argues the issue of the collection of the overpayment is not ripe because the Division admits it does not have discretion to waive any overpayments.

The Division argues that the issue regarding the method of collecting the alleged overpayment is not ripe for this Court's review because the "Division has not attempted recovery." Div. Substitute Brief, p. 35. The Division's own actions contradict this statement.

The Division totally ignores the notices it sent to Mr. Crawford, found at Volume I of the Transcript at pages 143 and 145. Those notices declare the overpayment, and state: "This Overpayment is a result of your error or omission." The notices then quote Section 288.380, and state that the claimant "shall" have such sums deducted from further benefits. The notices also quote the part of the statute stating the Division "shall" pursue the overpayment through billing and offsets against state income tax refunds. The notices also indicate an address where Mr. Crawford can send his check or money order to repay the overpayment. Tr 1, pp 143-145. Based upon the notices and the Division's position, no reasonable person would think the Division was not going to collect the overpayment.

The Division, throughout its Brief, makes it clear it does not believe it has discretion to waive any overpayment and must collect all overpayments from

claimants. For example, the Division states that Section 288.380 provides “recovering overpaid. . . . benefits shall be pursued by the division against any person receiving such overpaid . . . benefits’ and enumerates the methods of recovery to be used.” Division Substitute Brief, p. 41. The Division further argues: “Crawford’s interpretation would result in the Division being limited in how it can recover overpayments, which is contrary to legislative intent and the express language of the statute.” Div. Substitute Brief, p. 42. The Division is clearly arguing it must collect overpayments, and it has a variety of ways to do that, and that it is not limited in the methods it chooses.

If the Division’s reading of the statute is correct, the issue then must be ripe. However, if the Division wants to admit that it is not mandated by Section 288 to recover overpayments, but has discretion whether to seek them, ripeness might be an arguable issue. But the Division’s entire argument here is that the Division has no choice but to collect this overpayment.

The reference by the Division to the opportunity for a hearing about the collection of the overpayment does not change anything, for any such hearing cannot challenge the finding of the overpayment itself. Thus, there are no issues left to be decided at any hearing if one appeals the notice of recovery by the Division.

The Division contends that the recent decision, *Hergins v. Div. of Employment Sec.*, WD 73190, ___ S.W.3d ___ (Mo. App. W.D. March 6, 2012) is inapplicable in this situation and is inconsistent with federal policy. Div. Substitute Brief, p. 45. Mr. Crawford would not normally cite to this decision, as a motion for rehearing has been filed but not yet been ruled upon, but since the Division has referenced it, he will address it here.

In *Hergins*, the Division failed to notice that Mr. Hergins was eligible for regular unemployment benefits in Kansas before telling Mr. Hergins to file for Emergency Unemployment Compensation benefits. Slip Op. at 7. The Western District determined that, because the Division was trying to collect monies paid to Hergins pursuant to the Emergency Unemployment Compensation Act of 2008, the Act's overpayment provisions pre-empt Missouri's general repayment statute. Slip Op. at 9. Subsequently, the Western District remanded the case to the Commission for a determination of whether or not overpayment was proper in light of the federal statute, giving the Commission discretion to waive a repayment if there was no fault on part of the individual and if such a repayment would be contrary to equity and good conscience. Slip Op. at 11.

Clearly, *Hergins* gives the Division the discretion to waive repayment if the situation allows. Because *Hergins* merely reiterates that the Division needs to use

federal law when collecting repayment pursuant to federal law, a common preemption principle, it is consistent with federal policy and is wholly applicable to Mr. Crawford's situation.

Under the *Hergins* decision, it would be proper for the Division to waive Crawford's repayment of the EUC funds he received. Here, it is abundantly clear that Crawford was not at fault in any way for receiving EUC benefits: he reported to the Division, kept the Division informed about his pursuit of Social Security benefits, and let the Division know when he was granted Social Security benefits. Furthermore, requiring Crawford to repay would be contrary to equity and good conscience, seeing as Crawford was honest throughout the process, desired to work, and simply had trouble holding a job due to his illness.

It is not clear why the Division argues that Mr. Crawford still had time to appeal the decision about SSI benefits prior to the declaration of the overpayment. Div. Substitute Brief, p. 53. Mr. Crawford was approved for Social Security Disability and SSI. The calculations appear to be correct, especially since Mr. Crawford relied on the fact that the Social Security Administration and the Division were working with each other, and each knew what the other was doing. The two systems worked together as they should. If Mr. Crawford did appeal, there would be no issue to determine. The Social Security Administration would not have any

reason to find it erred. Mr. Crawford should not be forced to hire yet another attorney. If he pursued an appeal to the Social Security Administration, the Division would still insist on collecting the overpayment. And if he lost such an appeal, the Division would have argued against his right to challenge the overpayment. Mr. Crawford should not be penalized in these circumstances.

CONCLUSION

Ricky Arnaz Crawford was properly deemed eligible for benefits at all relevant times. If he was not eligible it is only because of a subsequent final decision of a Social Security Administration Administrative Law Judge that he was entitled to disability payments, so the benefits paid to Mr. Crawford cannot be denied or reduced. All four determinations and the Decisions of the Commission should be reversed. And even if it is decided that Mr. Crawford was overpaid benefits due to some technicality, the Court should clearly state that the overpayment was not caused by any misrepresentation or fraud on his part, so any penalty or recovery would be limited to a reduction of future benefits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that:

1. The attached Substitute Reply Brief complies with Rule 84.06 and contains 2,153 words, as counted by Microsoft Word.
2. The Substitute Reply Brief was filed electronically with the Clerk of the Supreme Court of Missouri using the electronic filing system on April 2, 2012.
3. Notification of the filing of this Brief was sent to Counsel for the Division of Employment Security, Jeannie Desir Mitchell, by way of the electronic filing system.

s/ John J. Ammann #34308